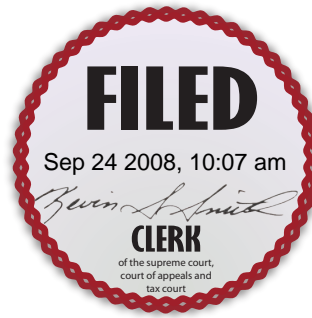


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**IN THE
COURT OF APPEALS OF INDIANA**

JOSEPH SMITH.

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0802-CR-168

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G06-0610-FC-193615

SEPTEMBER 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Joseph Smith appeals his conviction of child molesting, a Class C felony. We affirm.

ISSUE

Smith raises one issue for our review, which we restate as: Whether the trial court abused its discretion in admitting the child victim's videotaped pre-trial statement and the transcript of that statement.

FACTS AND PROCEDURAL HISTORY

At a time the victim, J.S., was five or six years old, her grandfather, Smith, removed J.S.'s clothing before she went to bed. While J.S. pretended to sleep, Smith touched her breasts and vagina with his hand. Smith held his hand "still" while touching J.S.'s vagina, but he moved his hand while touching her breasts. He also touched her buttocks. Similar touchings occurred on two or three other occasions. A few weeks thereafter, J.S. told her neighbors about the touchings, and the neighbors called the police or Child Protective Services. The neighbor's report led, shortly thereafter, to J.S. becoming a ward of the State.

When J.S. was nine years old, Child Protective Services arranged for a forensic interview of J.S. During the interview, J.S. described the initial touchings and explained that the touchings occurred on two or three other occasions.

The State charged Smith with the molestation of J.S.¹ Prior to trial, the State filed a "Notice of Intent to Introduce Statement Pursuant to I.C. 35-37-4-6 and Request for Hearing." (Appellant's App. at 54-55). At the child hearsay hearing, the court heard testimony from J.S., J.S.'s adoptive mother, and the forensic interviewer, Diane Bowers. The trial court issued

¹ At the same time, the State charged Smith with the molestation of another young girl. Upon Smith's motion, this charge was severed from the charge involving J.S.

findings of fact and conclusions of law in support of its decision to allow the introduction of child hearsay at trial.

At trial, J.S. testified that Smith touched her, but she was unable to testify to Smith's specific actions. After a break to regain her composure, J.S. indicated on a diagram that Smith touched her breasts, genitals, and buttocks. The State, over Smith's objections, then offered into evidence and presented the videotape of the forensic interview. Additionally, after Bowers indicated that an accurate transcript of the interview had been made, the trial court, over Smith's objection, allowed the State to publish the transcript to the jury.

The transcript was entered into evidence as demonstrative evidence. The trial court specifically admonished the jurors regarding their use of the transcript, and it indicated that "the tape is evidence, not the transcript." Tr. at 50-51. After Smith again objected, the trial court told the jurors, "The transcript was admitted for demonstrative purposes only. It is a tool to help you in going through the video. You are not going to be able to just read [the transcript] and think that is the evidence. It's got to be what you can discern from that videotape." Tr. at 53-54.

The jury found Smith guilty of one count of child molesting, a Class C felony. He now appeals.

DISCUSSION AND DECISION

Smith contends that the trial court abused its discretion in admitting J.S.'s videotaped statement. Specifically, he argues that the videotaped message was not sufficiently reliable under Indiana's Protected Person Act (Ind. Code § 35-37-4-6). The Act provides that an otherwise inadmissible statement or videotape made by a child under fourteen years of age is admissible in a criminal action involving sex crimes defined in Indiana's code (Ind. Code § 35-42-4-1 et al.).

A trial court's decision to admit statements under the Act will not be reversed absent a showing of manifest abuse of discretion by the trial court resulting in the denial of a fair trial. *M.T. v. State*, 787 N.E.2d 509, 511 (Ind. Ct. App. 2003). An abuse of discretion occurs only when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id.*

Under the Act, a statement or videotape that is made by someone who at the time of trial is a protected person, concerns an act that is a material element of the charged offense, and is not otherwise admissible, becomes admissible if the court finds that the "time, content, and circumstances of the statement or videotape provide sufficient indications of reliability, and the 'protected person' either testifies at trial or is found to be unavailable." *Id.* at 512. Considerations in making the reliability determination under the Act include "the time and circumstances of the statement, whether there was significant opportunity for coaching, the nature of questioning, whether there was a motive to fabricate, use of age appropriate terminology, and spontaneity and repetition." *Id.* (quoting *Pierce v. State*, 677 N.E.2d 39, 44 (Ind. 1997)).

In the present case, it does not appear that the trial court's admission of the videotaped statement was an abuse of discretion. First, the statement was made to a trained professional in a one-on-one setting, and the interviewer did not use leading questions until after J.S. had already described Smith's criminal acts. Specifically, J.S. told the interviewer that she was there to help stop Smith from doing "bad stuff." Exs. 2; 3 at 13. The interviewer asked what happened, and J.S. responded, "[Smith] did bad stuff to me." Exs. 2; 3 at 14. The interviewer then asked, "[W]hat exactly did [Smith] do to you?" Exs. 2; 3 at 15. J.S. answered that Smith touched on

her “breast,” “vagina,” and “butt.” Exs. 3; 3 at 17-21. She stated that his hand was still when he touched her vagina but that he rubbed her breast. *Id.*

While it is true that a substantial period of time passed between the touchings and the statement, this is just one factor to be considered and is not necessarily dispositive. *See Trujillo v. State*, 806 N.E.2d 317, 328 (Ind. Ct. App. 2004). The time delay did not result in a change of J.S.’s initial explanation made to her neighbors approximately a week after the touchings and rubbing began.

Second, the evidence indicates that J.S. was removed from family influences and placed in the care of third parties immediately after telling the neighbors about Smith’s actions. She remained in the care of third parties and was adopted by a foster mother. The foster mother testified that she did not coach J.S. and had not spoken to J.S. about the allegations. The trial court concluded that there was nothing in the evidence to suggest that J.S. was at any time subjected to coaching or to suggest that J.S. had any motive to fabricate allegations.

Third, J.S. used age-appropriate terms to describe the areas that Smith touched or rubbed. Fourth, J.S. testified at trial and at the child hearsay hearing. Her testimony showed that she understood the difference between the truth and a lie and reaffirmed the truth of her prior statement. In addition, her testimony gave Smith ample opportunity for cross-examination.

Taking all the factors into consideration, we cannot say that the trial court abused its discretion in deeming the videotaped statement reliable. Thus, the trial court did not abuse its discretion in admitting the statement.

Smith also argues that the trial court abused its discretion in admitting the transcript as demonstrative evidence. Smith points out that under Indiana law, a transcript should not be admitted into evidence unless both sides stipulate to its accuracy and agree to its use as evidence.

Appellant's Brief at 6 (citing *Bryan v State*, 450 N.E.2d 53, 59 (Ind. 1983)). Smith further points out that though Bowers stated that the transcript could be of some help in understanding the videotape, she did not state why help was needed. Smith emphasizes that a transcript becomes necessary only when portions of the tape are inaudible or when the transcript assists the jury in identifying who is speaking on the tape. *Id.* at 7 (citing *Bryan, id.*). Smith notes that neither of the aforementioned conditions was present in the instant case. Smith further notes that the trial court compounded its error by admitting the transcript as evidence.

Our review of the trial transcript shows that the trial court did not commit reversible error in admitting the transcript for demonstrative purposes. The trial court twice admonished the jury that the videotape was the substantive evidence and that the transcript was only admitted to help the jury to understand the videotape. Indeed, the trial court emphasized that in the event of any discrepancy between the videotape and the transcript, the jury should credit the videotape. There is no prejudice to Smith under these conditions.²

Finally, Smith contends that the admission of the videotape and the transcript amounted to "a 'drumbeat repetition' of [J.S.'s] original story under *Modesitt v. State*, 578 N.E.2d 649, 653 (Ind. 1991)." Appellant's Brief at 8. Smith argues that the combined impact of J.S.'s trial testimony, the testimony on the videotape, and the transcript was substantial.

In *Stone v. State*, 536 N.E.2d 534 (Ind. Ct. App. 1989), *trans. denied*, this court reversed a child molesting conviction because, after the child victim had already testified, six other witnesses were permitted to testify about what the child victim told them about the molestation. We held that the probative value of the six persons' testimonies was outweighed by the prejudicial effect of the repetition of the inflammatory aspects of the State's case. *Id.* at 540.

² Smith suggests that the transcript should have been used as an aid without its admission into evidence as a demonstrative exhibit. It is unclear how admission into evidence resulted in an additional adverse effect. Furthermore, admission of the demonstrative exhibit preserved the transcript for review on appeal.

Later, in *Modesitt*, our supreme court reversed a child molesting conviction because the victim's mother, caseworker, and psychologist all testified about the victim's statements to them before the victim testified. The court held "as did the Court of Appeals in [*Stone*], we could not say that the drumbeat repetition of the victim's original story prior to the calling of the victim to testify did not unduly prejudice the jury which convicted [the defendant]." 578 N.E.2d at 651-52.

Here, unlike in *Stone* and *Modesitt*, the jury did not hear a constant drumbeat of witnesses that improperly bolstered J.S.'s testimony. The jury heard a very scared young child's testimony in court and the same child's consistent testimony that had been videotaped in a less threatening atmosphere. The jury also had access to a transcript that, however slightly, helped the jury members to understand the videotape. There is no drumbeat repetition here.

CONCLUSION

The trial court did not abuse its discretion in admitting the videotape, and Smith was not prejudiced by admission of the transcript. Furthermore, there was no impermissible drumbeat of repetition in this case.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.